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VALID LEGISLATION

THE POWER OF THE FEDERAL JUDICIARY TO DECLARE LEGISLATION INVALID WHICH CONFLICTS WITH THE FEDERAL CONSTITUTION

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PRESENTED BY MR. BURTON

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IN THE SENATE OF THE UNITED STATES,
February 19 (calendar day, March 1), 1915.

Resolved, That a pamphlet entitled "The power of the Federal judiciary to declare legislation invalid which conflicts with the Federal Constitution," by David K. Watson, be printed as a Senate document.

Attest:

JAMES M. BAKER, *Secretary.*

THE POWER OF THE FEDERAL JUDICIARY TO DECLARE LEGISLATION INVALID WHICH CONFLICTS WITH THE FEDERAL CONSTITUTION.

By DAVID K. WATSON, of the Columbus, Ohio, Bar, author of "Watson on The Constitution."

It seems popular in these days to attack the Federal judiciary and accuse them of assuming and exercising powers which it is claimed the Constitution does not confer upon them. Some eminent jurists and constitutional writers maintain that the Federal judiciary have no authority to declare legislation void when it is in conflict with the Constitution of the United States.

In an address delivered on the 27th of April, 1906, before the law department of the University of Pennsylvania, Hon. Walter Clark, Chief Justice of the Supreme Court of North Carolina, used the following language when referring to the Convention of 1787, which framed the Federal Constitution:

> A proposition was made in the convention—as we now know from Madison's Journal—that the judges should pass upon the constitutionality of acts of Congress. This was defeated 5 June, receiving the vote of only two States. It was renewed no less than three times, i. e., on 6 June, 21 July, and finally again for the fourth time on 15 August.

In the same address the learned chief justice also said:

> The subsequent action of the Supreme Court in assuming the power to declare acts of Congress unconstitutional was without a line in the Constitution to authorize it, either expressly or by implication. (Congressional Record, June 15, 1908, pp. 8063, 8065.)

This address of Chief Justice Clark is undoubtedly largely responsible for the charge of usurping authority so frequently made against the Federal courts. The address has been published in the Congressional Record and certain members of the National House of Representatives have quoted from it in their speeches delivered in the House and published in the Record.[1] The address and speeches have been quoted in partisan papers throughout the country and in this way the charge of usurpation of authority by the Federal judges has reached the great body of the American people. The result is that the people have to a great extent become dissatisfied with the Federal judiciary.

The question is one of great interest to the whole Nation as well as to the Federal judges and deserves a careful and impartial examination.

[1] Notably Hon. A. W. Lafferty, of Oregon, in the Record of Jan. 24, 1912, and Hon. Isaac R. Sherwood, of Ohio, in the Record of May 2, 1912. Each of these Members repeats in his speech the charge of usurpation made by Chief Justice Clark against the Federal judiciary. Prof. William Trickett, dean of the law school of Dickinson College, and one of the most profound legal writers of the country, has also attacked the Federal judiciary for assuming to declare laws unconstitutional in the fortieth and forty-first volumes of the American Law Review, pp. 356 and 651, respectively. So Melville M. Bigelow, the eminent legal writer, in his late work entitled "A False Equation," p. 133, seems to question the right of the courts to exercise such power.

THE QUESTION IN THE STATE COURTS PRIOR TO THE ADOPTION OF THE FEDERAL CONSTITUTION.

At the time the convention met which framed the Federal Constitution, which was in May, 1787, five States through their courts had declared certain statutes passed by their respective legislatures to be in conflict with their State constitutions and consequently void, to wit: Virginia, Rhode Island, New York, New Jersey, and North Carolina. One of the earliest, if not the earliest, of these cases was Commonwealth *v.* Caton, decided in 1782, in which the Court of Appeals of Virginia held an act of the legislature to be unconstitutional because it deprived the governor of the State of the pardoning power which had been conferred upon him by the constitution of the State.

Judge Wythe (in whose office Thomas Jefferson, James Madison, James Monroe, John Marshall, and Henry Clay read law), in delivering the opinion of the court said:

> If the legislature should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the Constitution, will say to them, here is the limit to your authority; and hither shall you go, but no further. (4 Call., 5–8.)

THE QUESTION IN THE FEDERAL CONVENTION OF 1787.

The members of the convention which framed the Federal Constitution could not have been strangers to the question we are considering. We have already seen that the courts of five of the original thirteen States had exercised the power to declare enactments of their respective legislatures to be unconstitutional before the Federal convention met.

In order to understand the question it is necessary to know just what action the constitutional convention took on it, and that we now proceed to show.

On the 29th of May, 1787, Mr. Randolph submitted to the convention his plan for a constitution. The eighth resolution of the plan read:

> That the Executive and a convenient number of the national judiciary ought to compose a council of revision, with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by the members of each branch. (2 Madison's Journal, 62, Scott's Edition.[1])

It does not require a philosophical mind to distinguish between the functions of a council of revision and those of a court. Mr. Ran-

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[1] Randolph's idea of a council of revision was probably suggested by a provision in the constitution of New York, which was adopted in 1777, and was in force when the Federal convention met in 1787. It provided that the governor, chancellor, and the judges of the supreme court should constitute a council of revision, to which all bills introduced into the legislature should be submitted.

Chancellor Kent paid the following tribute to this council of revision:

"The control which the judicial power of the State had, until the year 1823, over the passing of laws by the institution of the council of revision, anticipated in a great degree the necessity of this exercise of duty by the courts. A law containing unconstitutional provisions was not likely to escape the notice and objection of the council of revision, and the records of that body will show that many a bill which had heedlessly passed the two houses of the legislature was objected to and defeated on constitutional grounds." (1 Kent, 491, 11th Ed.)

dolph's resolution only provided for a council of revision which should be empowered to examine every act of Congress before it went into operation, and that the dissent of the council should amount to a rejection of the act, unless Congress should again pass it. "The council" under this plan was composed of the Executive, that is, the President, and a "convenient number of the national judiciary." What number that would be, and who was to select them, the resolution did not provide. The resolution failed to make any reference to any court, but used the term "The Council of Rivision." This was to consist of two elements: First, the Executive, and, second, a convenient number of the national judiciary. It is unnecessary to follow the details of the resolution through the debate on it in the convention. Suffice it to say that it was defeated.

On the 6th of June Mr. Wilson moved to reconsider the vote, and that motion was defeated, but three States, to wit, Connecticut, New York, and Virginia, voted for it. (Madison's Journal, 123, Scott's Edition.)

On the 21st of July Mr. Wilson again moved: "That the supreme national judiciary should be associated with the Executive in the revisionary power." (Madison's Journal, 398, Scott's Edition.)

This motion made the supreme national judiciary and the Executive a council of revision. It was the same motion which had been defeated in the convention, except that it defined the number of judges who should be associated with the Executive, to wit, the supreme national judiciary, i. e., the Supreme Court. In effect it constituted the Supreme Court and the Executive a council of revision, but this motion was also defeated.

At a later period in the convention, to wit, on August 15, Mr. Madison brought the same question before the convention for the third and last time by making the following motion:

> Every bill which shall have passed the two Houses shall, before it become a law, be severally presented to the President of the United States and to the judges of the Supreme Court for the revision of each. If, upon such revision, they shall approve of it, they shall, respectively, signify their approbation by signing it; but if, upon such revision, it shall appear improper to either or both to be passed into a law, it shall be returned, with the objections against it, to that House in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider the bill; but if after such reconsideration two-thirds of that House, when either the President, or a majority of the judges, shall object, or three-fourths, where both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds, or three-fourths of the other House, as the same may be, it shall become a law. (Madison's Journal, 532, 533, Scott's edition.)

This motion caused some debate in the convention, but was defeated by a vote of three to five, being the same vote by which the original motion was defeated. The question was never again brought before the convention. At no time in the history of that body, according to Madison's Journal, was the question, in any shape or form, presented to the convention, that judges should have the power of declaring laws unconstitutional, and therefore such a motion could not have been defeated in the convention. Chief Justice Clark's statement in his address already referred to, that "A proposition was made in the convention—as we now know from Madison's Journal—that the judges should pass upon the constitutionality of acts of Congress," seems to lack foundation in fact. Certainly there is not a line in Madison's Journal which sustains his statement.

No student of the Constitution and no one ordinarily versed in the law will claim that a motion, a resolution, or an amendment, which simply seeks to create a council of revision, is the same as conferring upon judges the power to pass upon the constitutionality of legislation. It is not only inaccurate as a historical fact, to say that such a proposition was introduced into the convention and there defeated, but it is wrong to mislead the public upon such an important question.

Three times the convention defeated a proposition creating a council of revision, but at no time did it defeat a proposition conferring on the courts power to interpret statutes and declare them unconstitutional. No such proposition was submitted to the convention and therefore could not have been defeated.

It is most unfortunate that an erroneous impression of what actually occurred in the Constitutional Convention on this question should have been given to the people and circulated among them. Whatever their opinion on the subject may be, it should be based upon historical facts and not upon historical errors.

THE QUESTION IN THE STATE CONVENTIONS.

When the Constitution was submitted to the various States for ratification or rejection the question of the power of the courts to pass upon the validity of legislation was considered in some of the State conventions.

Oliver Ellsworth, who had been a member of the Constitutional Convention from Connecticut and who afterwards became Chief Justice of the United States Supreme Court, said in the Connecticut convention:

> This Constitution defines the extent of the powers of the General Government. If the General Legislature should at any time overstep their limits the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges who to secure their impartially are to be made independent, will declare it to be void. (Elliott's Debates, vol. 2, 196.)

While the question was being considered in the Virginia convention John Marshall, who had not been a member of the Federal Constitutional Convention, took part in the discussion upon the question and defended the right of the courts to pass upon the validity of legislation, and used this language:

> If the United States were to make a law not warranted by any of the powers enumerated it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void. To what quarter will you look for protection from an infringement on the Constitution if you will not give the power to the judiciary? There is no other body that can afford such protection. (Elliott's Debates, vol. 3, 553.)

In the South Carolina convention, Charles Pinckney discussed the question and referred to the duties and powers of the Supreme Court as follows:

> It would be their duty not only to decide all national questions which should arise within the Union, but to control and keep the State judicials within their proper limits whenever they shall attempt to interfere with its power. (Elliott's Debates, vol. 4, 258.)

In the convention of Pennsylvania, James Wilson, who had been a member of the Constitutional Convention, and afterwards became a justice of the Supreme Court of the United States, said:

If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence and the particular powers of government being defined, will declare such law to be null and void. For the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law. (American Historical Review, vol. 13, No. 2, 284.)

Luther Martin, who was one of the most influential members of the convention from Maryland, and who was opposed to much of the Constitution, after the convention had adjourned delivered an address to the Legislature of Maryland, and, in reference to the power of the courts, spoke as follows:

These courts, and these only, will have a right to decide upon the laws of the United States, and all questions arising upon their construction, and in a judicial manner to carry those laws into execution. Whether, therefore, any laws or regulations of the Congress, any acts of its president or other officer, are contrary to, or not warranted by, the Constitution, rests only with the judges, who are appointed by Congress to determine. (Elliott's Debates, vol. 1, 380.)

Alexander Hamilton stated his views concerning the question in the Federalist, as follows:

Some perplexity, respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. * * * If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this can not be the natural presumption where it is not to be recollected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. * * * It can be of no weight to say, that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. (The Federalist, No. 78.)

THE QUESTION IN THE FEDERAL COURTS.

The power of the Federal courts to declare a State statute unconstitutional first came before such a court in Van Horn's Lessee *v.* Dorrance, decided on the circuit in 1795. Mr. Justice Patterson, delivering the opinion, said:

I take it to be a clear position that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the force of repugnance. I hold it to be a position equally clear and sound, that, in such case, it will be the duty of the court to adhere to the Constitution, and to declare the act null and void. (2 Dallas, 309.)

The subject was considered by the Supreme Court of the United States for the first time in Cooper *v.* Telfair (4 Dall., 14). Each of

the judges who constituted the court delivered an opinion, and held that while the case under consideration did not justify them in applying the principle in that particular case, they had no doubt of the power of the court under the Federal Constitution to declare laws invalid which conflicted with that instrument.

In Marbury *v.* Madison, decided in February, 1803, the authority of the courts to declare an act of Congress void was first announced by the Supreme Court of the United States. Chief Justice Marshall, delivering the opinion of the court, said:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. (1 Cr., 177.)

In his great opinion in Martin *v.* Hunter, Mr. Justice Story said:

> The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. (1 Wheat., 304, 344.)

This opinion was followed by the masterful discussion of Marshall, in Cohens *v.* Virginia, in which the great Chief Justice said:

> The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States are absolutely void. In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the Constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution? We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the Nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The propriety of intrusting the construction of the Constitution and laws made in pursuance thereof to the judiciary of the Union has not, we believe, as yet been drawn into question. (6 Wheat., 414, 415.)

The doctrine was fully examined and commented upon in the exhaustive opinion of Mr. Justice Wayne in Dodge *v.* Woolsey, decided in 1855. In his opinion, Mr. Justice Wayne uses this language:

> Men unite in civil society, expecting to enjoy peacefully what belongs to them, and that they may regain it by the law when wrongfully withheld. That only can be accomplished by good laws, with suitable provisions for the establishment of courts of justice, and for the enforcement of their decisions. The right to establish them flows from the same source which determines the extent of the legislative and executive powers of the Government. Experience has shown that the object can not be attained without a supreme tribunal as one of the departments of the Government, with defined powers in its organic structure, and the mode for exercising them to be provided legislatively. This had been done in the Constitution of the United States. Its framers were well aware of this responsibility to secure justice to the people; and well knew, as the object of all trials in courts was to determine the suits between citizens, that it could not be done satisfactorily to them, unless they had the privilege to appeal from the first tribunal which had jurisdiction of a suit to another which should have authority to pronounce definitely upon its merits. (Vattel, 9th chap. on Justice and Polity.) Without such a court the citizens of each State could not have enjoyed all the privileges and immunities of citizens in the several States, as they were intended to be secured by the second section of the fourth article of the Constitution. * * * Without the Supreme Court, as it has been constitutionally and legislatively consti-

tuted, neither the Constitution nor the laws of Congress passed in pursuance of it, nor treaties, would be in practice or in fact the supreme law of the land, and the injunction that the judges in every State should be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding, would be useless, if the judges of State courts, in any of the States, could finally determine what was the meaning and operation of the Constitution and laws of Congress, or the extent of the obligation of treaties. (18 How., 331, 354, 355.)

In 1858 Chief Justice Taney announced his great opinion in Ableman *v.* Booth, in which he reviewed the question under consideration at great length. Perhaps there is no more forceful exposition of the power of the Federal courts, under the Constitution to declare invalid an act of Congress which conflicts with the Constitution than is found in this elaborate opinion. It carries the doctrine to its extreme limit and boldly announces that the power of the courts to declare legislation invalid "is too plain to admit of doubt or to need comment." Says the opinion:

The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home, for if this object could be attained there would be but little danger from abroad; and to accomplish this purpose it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government, and that in the sphere of action assigned to it it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the Constitution by which this power is granted is too plain to admit of doubt or to need comment. * * * But the supremacy thus conferred on this Government could not be peacefully maintained unless it was clothed with judicial power equally paramount in authority to carry it into execution, for if left to the courts of justice of the several States conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. * * * Accordingly, this power was conferred on the General Government in clear, precise, and comprehensive terms. It is declared that its judicial power shall extend to all cases in law and equity arising under the Constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. * * * This judicial power (p. 520) was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that the act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void. * * * No one can fail to see that if such an arbiter had not been provided in our complicated system of government internal tranquillity could not have been preserved. * * * In organizing such a tribunal it is evident that every precaution was taken which human wisdom could devise to fit it for the high duty with which it was intrusted. * * * So long, therefore, as this Constitution shall endure this tribunal must exist with it, deciding in the peaceful forms of judicial proceedings the angry and irritating controversies between sovereignties which in other countries have been determined by the arbitrament of force. (21 Howard, 517.)

The opinions which we have cited are fully sustained by the more modern decisions. Chief Justice Chase, in Hepburn *v.* Griswold, stated the rule to be:

When a case arises for judicial determination and the decision depends on the alleged inconsistency of a legislative provision with the fundamental law, it is the plain duty

of the court to compare the act with the Constitution, and if the former can not, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute. This seems so plain that it is impossible to make it plainer by argument. If it be otherwise, the Constitution is not the supreme law. It is neither necessary or useful in any case to inquire whether or not any act of Congress was passed in pursuance of it, and the oath which every member of this court is required to take becomes an idle and unmeaning form. (8 Wallace, 603, 611.)

Mr. Justice Harlan in Lent *v.* Tillson went as far as any of his predecessors and used this language:

It is the duty of a county court to hold a statute unconstitutional and void if such is its opinion. "That court is obliged by its oath of office, and in fidelity to the supreme law of the land, to refuse to give effect to any statute that was repugnant to the law, anything in the statute or the constitution of the State to the contrary notwithstanding." (140 U. S., 316, 329.)

"The duty rests upon all courts, Federal and State," said the same learned justice in Smythe *v.* Ames, "when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land." (169 U. S., 466, 527, 528.)

Mr. Justice Brewer in Fairbank *v.* United States, said:

The judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of the nation. (181 U. S., 286.)

In the later case of McCray *v.* United States, Mr. Justice White said:

Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the Government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the Government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the Government, upon which our system is founded, and would be a mere act of judicial usurpation. (195 U. S., 27, 53, 54.)

Mr Justice Day in the recent case of Muskrat *v.* United States, after commenting upon many of the preceding cases, made the following philosophical comment on the general proposition:

The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the ligitants in justicable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. (219 U. S., 346, 361.)

The most profound exponent of the Federal Constitution which the American bar has produced was Daniel Webster. As an advocate he stands peerless and alone in the field of constitutional controversy and interpretation. While he did not speak with judicial authority, what he said concerning the Constitution is of such momentous weight that it can not be ignored. In his great speech in

the Senate on January 26, 1830, he spoke as follows on the power of the courts to construe the Constitution:

But, sir, the people have wisely provided, in the Constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law. There are in the Constitution grants of powers to Congress, and restrictions on these powers. There are, also, prohibitions on the States. Some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions and prohibitions. The Constitution has itself pointed out, ordained, and established that authority. How has it accomplished this great and essential end? By declaring, sir, that "the Constitution and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding." This, sir, was the first great step. By this the supremacy of the Constitution and laws of the United States is declared. The people so will it. No State law is to be valid which comes in conflict with the Constitution, or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, sir, the Constitution itself decides also, by declaring, "that the judicial power shall extend to all cases arising under the Constitution and laws of the United States." These two provisions cover the whole ground. They are, in truth, the keystone of the arch. With these it is a government; without them it is a confederation. In pursuance of these clear and express provisions, Congress established at its very first session, in the judicial act, a mode of carrying them into full effect, and for bringing all questions of constitutional power to the final decision of the Supreme Court. If then, sir, because a government. It then had the means of self protection; and but for this, it would, in all probability, have been now among things which are past. (Webster's Works, vol. 3, 334, 335.)

So eminent an authority as Judge Story in discussing this question has said:

From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions. (Story on the Constitution, vol. 2, 610, 611.)

The Constitution says:

The judiciary power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress shall from time to time ordain and establish. (Constitution, Art. III, sec. 1.)

Judicial power is the power to hear and determine a cause. Mr. Justice Miller said:

It is the power of the court to decide and pronounce a judgment and carry it into effect between persons or parties who bring a case before it for decision. (Miller on the Constitution, 313.)

Suppose a case is presented to a Federal judge which involves the validity of an act of Congress. Does not the judge have the power to pass upon the constitutionality of the statute in such a case? How could it be otherwise? How could the judge decide the case without deciding whether or not the act was or was not constitutional? When the basis for a claim fails, the claim must also fail.

The Constitution is the supreme law of the land, made so by its own provisions. If it is not the function of the courts to give it a construction, where is the power found which shall? Suppose two laws are directly in conflict, one constitutional and the other not, what tribunal is ultimately to decide which of the two is unconstitutional unless it be the courts?